Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA AND OR TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

CARL STILL, *Petitioner*

v.

NORFOLK & WESTERN RAILWAY COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA AND OR TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Mercer County, West Virginia, entered in the above-entitled case on October 16, 1959, and the judgment of the Supreme Court of Appeals of West Virginia, entered in the above-entitled case on September 12, 1960.

OPINIONS BELOW

The judgment of the Circuit Court of Mercer County, West Virginia, is unreported; it is printed in Ap-

pendix A hereto, *infra*, p. 1a. A Petition for Writ of Error and Supersedeas was filed in the Supreme Court of Appeals of West Virginia but denied by that court without opinion. The judgment of the Supreme Court of Appeals of West Virginia is also unreported; a copy of the clerk's memorandum of the court's judgment is printed in Appendix A hereto, *infra*, p. 4a.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered September 12, 1960. By order dated December 1, 1960, the time to file Petition for Writ of Certiorari was extended by the Chief Justice to and including February 10, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) (1959).

QUESTION PRESENTED

In a Federal Employers' Liability Act case, did the trial court err in directing a verdict for the respondent railroad on the ground that the petitioner employee, because of alleged misrepresentations relating to his health and physical condition made when he applied for employment, failed to achieve the status of an employee entitled to the benefits of the Act where (a) petitioner worked satisfactorily for respondent for more than 5 years prior to the accident, (b) the alleged misrepresentations were made more than six years prior to the accident during which period respondent had fired and rehired petitioner after more than a year's absence without application or examination, (c) the principal alleged misrepresentation was a pre-existing congenital physical condition which was plainly visible to respondent's examining physician at the time he ap-

proved petitioner for employment, (d) none of the alleged misrepresentations had any causal relationship with the happening of the accident, and (e) there was highly persuasive evidence that there had been no misrepresentation?

STATUTE INVOLVED

45 U.S.C. § 51 (1959) (Federal Employers' Liability Act):

> "Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
>
> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of

interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT

Petitioner, a yard brakeman employed for more than five years by respondent, Norfolk & Western Railway Company, was severely injured during the course of a switching operation in respondent's railroad yards in Bluefield, West Virginia on January 23, 1958 (Tr. 476, 497, 1006, 1190). His injury, which permanently disabled him, occurred when a string of railroad cars overtook and violently recoupled with a railroad car on which he was riding pursuant to instructions of his superior (Tr. 68, 71, 146-147, 375, 520, 1007, 1023, 1437).

The evidence was clear that the accident resulted from the negligence of respondent's employees and that petitioner was an innocent victim thereof (Tr. 207, 340, 513, 1022-1025, 1032-1035, 1052). The impact, a hard one, caused petitioner to be thrown forward (Tr. 207, 208, 210, 338, 1044), and his left side, from about his waist to just above his knee, was hurled against the car on which he was riding (Tr. 210, 525).

The effect of the accident was to separate and dislocate petitioner's spinal column, which thus disabled him from engaging in manual labor, the only kind of work he knew (Tr. 68-71, 146-147). Thirty-one years old at the time of his injury, petitioner, a Negro, has never worked in any capacity other than that of a laborer (Tr. 487).

The condition which petitioner was alleged to have concealed is known medically as spondylolisthesis (Tr. 53, 81). This condition involves any amount of slipping forward of one vertebra on another (Tr. 52-53, 121). In its ordinary and non-aggravated form it frequently passes unnoticed by the victim and no symptoms are associated with it (Tr. 54, 148, 664, 669, 683, 688, 853). Indeed, many persons go through life without knowing they have such a condition (Tr. 682, 684, 860). They are able to perform the most strenuous kind of physical labor (Tr. 54, 683, 855). Petitioner seems to have had the condition in this form since his birth (Tr. 53, 82, 120, 664, 852, 853).

The evidence at the trial was that the impact which petitioner sustained was so severe that his vertebrae were separated and dislocated (Tr. 152-153), resulting in permanent disability (Tr. 68-71, 146-147); that this disability came about from the trauma suffered by petitioner in the accident (Tr. 54, 152-153).

Suit was filed May 14, 1959; the case was pre-tried August 10, 1959; on September 10, 1959, counsel for respondent stipulated that petitioner was an employee within the meaning of the Federal Employers' Liability Act (R. 93-94). Nevertheless, on the first day of trial, October 5, 1959, the trial judge permitted respondent, over petitioner's objection, to enter a special plea alleging that information given by petitioner when he sought employment in 1951 was wilfully false, that there was a causal connection between the alleged false information and the injuries sustained in the accident, and that petitioner therefore was not an employee within the meaning of the Federal Employers' Liability Act (R. 119). Petitioner's demurrer to the special plea was overruled by the trial judge (Tr. 14, 39; R. 126).

At the conclusion of all the evidence, the trial judge, over petitioner's objection, permitted respondent to amend its special plea, overruled petitioner's demurrer to the same, and ruled as a matter of law that petitioner had fraudulently obtained his employment by wilfully and falsely concealing material information, and that there was a causal connection between the concealed facts and the injuries; that petitioner therefore was not an employee within the meaning of the FELA and not entitled to the benefits thereof (Tr. 1400-1423; R. 129, 138; Appendix A, *infra*, p. 1a). The trial court therefore granted respondent's motion for a directed verdict and directed the jury so to find (Tr. 1423).

Petitioner attempted to appeal to the Supreme Court of Appeals of West Virginia; however, as stated, his Petition for Writ of Error and Supersedeas was denied by that court (R. 1727; Appendix A, *infra*, p. 4a).

During the trial, respondent contended that petitioner had obtained his employment by various misrepresentations relating principally to his health and prior employment. It contended that petitioner had falsely answered certain questions on his 1951 employment application and had also given false answers to certain questions asked by respondent's examining physician during his pre-employment physical examination, which information, according to the physician, was recorded by him (R. 119, 121, 1678-1679).

Petitioner denied that respondent's physician asked him the questions and that he gave the answers recorded by the physician (Tr. 704-708, 784). Petitioner also denied that the physician spoke to him individually (Tr. 639). He stated that the physician examined and spoke to five or six other men at the same time and

then gave him a bunch of papers to sign (Tr. 637, 639, 705, 708).

In contrast, respondent's physician had no personal recollection of examining and approving petitioner in 1951 but relied solely on his records (Tr. 1222, 1227). His testimony that he thought he had asked petitioner every question on the medical application in the order listed and then recorded the answers in his own handwriting was based "on his usual custom", not any recollection of this case (Tr. 1223, 1227, 1229).

Respondent's physician testified that the men were given different physical examinations depending upon the position applied for and that physical requirements for brakemen were the highest the railroad had (Tr. 1216-1217). He also characterized his 1951 pre-employment physical examination of petitioner as thorough and rigid (Tr. 1245-1247). Since petitioner's spondylolisthesis was readily discoverable on medical examination,[1] respondent's physician either failed to see what was readily apparent or chose to ignore it (Tr. 1246).

The impropriety in such circumstances of respondent's claim that information was concealed from it is further pointed up by the fact that respondent dismissed petitioner from its employment in October, 1956 (Tr. 781, 1281-1282; R. 1672); and subsequently, in November, 1957, reinstated him (Tr. 781; R. 1671). When he was reinstated, petitioner was required to sign

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[1] Petitioner's service records, as far back as 1947, noted that he had a "prominent sacrum with a hollow back . . . ." (Tr. 842). It was also discovered, of course, by Dr. Crutchfield, who examined petitioner for respondent for the purpose of being able to testify at trial and testified that he knew petitioner had a spondylolisthesis because he was able to feel a depression in his back (Tr. 662).

a waiver of all claims for loss of time and earnings for the interim period and to waive vacation rights until properly qualifying for them after reinstatement (R. 1673). From these circumstances it is clear that petitioner was hired again in 1957; nevertheless, he was not required to fill out a new application for employment, no medical information was requested by respondent and none given by petitioner, and respondent chose to give no physical examination except a routine eye examination (Tr. 1287). Moreover no such information or examination was requested or given at any time between petitioner's reinstatement and subsequent injury.

Respondent's principal contention in connection with its claim that petitioner obtained his employment by misrepresentation was directed to the existence of spondylolisthesis. It pointed, however, to other claimed falsities to which we make brief reference.[2] Peti-

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[2] Respondent claims petitioner received a medical discharge from the service and that his answer that he received an honorable discharge was false (R. 129, 131). Since petitioner's honorable discharge was introduced into evidence this claim seems without merit (R. 1677).

Respondent claims petitioner failed to list all prior employments (R. 129). Petitioner listed as previous employment a job he had held from November, 1948, to July, 1951, which job he left to obtain employment with respondent. He did not list other prior employments. Petitioner explained that he misinterpreted this question and that he thought he had answered it properly (Tr. 643, 644). This information seems wholly immaterial and irrelevant in this case.

Respondent claims petitioner failed to disclose that he had been previously employed by respondent (R. 131). Petitioner's recollection was vague as to whether he had been so previously employed, but he testified that he had not previously worked for respondent (Tr. 719, 732). In any event respondent's records showed that petitioner had been given credit for a few hours on

tioner categorically denied that he knowingly gave any false information (Tr. 1389).

No question was specifically directed to whether petitioner had spondylolisthesis. Assuming petitioner knew of this condition, three of the questions, considered carefully, might have called for him to furnish this information. The first of these, and his handwritten answer, appeared in petitioner's employment application as follows (R. 1678):

> "17. What is the general condition of your health at present?
>
> *Good* "

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the job, entitling him to $8.80 in 1943 and less than $3.00 in 1948 (Tr. 1002, 1003).

Respondent claims petitioner failed to disclose that he had had rheumatism (R. 131). As to this, petitioner explained that although he had been under a doctor's care for rheumatic fever sometime prior to his going into the Army and had had some trouble with his joints and back, he was also told by the doctor that he would outgrow it and that he would be all right (Tr. 723). In any event this too seems immaterial and irrelevant in this case.

Respondent claims petitioner failed to disclose prior injuries (R. 130). As to this, petitioner explained that he had been involved in a childhood automobile accident, that he understood that he hurt his side and that he believed he broke his ribs (Tr. 488, 614, 645). He had no personal recollection about this accident and explained that his mother had told him about it (Tr. 645)

Respondent claims petitioner failed to disclose that he had been previously examined for employment (R. 131). This question, however, indicated that it was only seeking information about prior examinations which had resulted in rejections and the reasons for the same (R. 1679). The evidence was that petitioner had passed several pre-employment examinations and had never been rejected for any reason (Tr. 601-602, 631). It appears therefore that he answered this question properly and that any information he might have volunteered would have been immaterial and irrelevant.

This question called for an opinion. In any event, the evidence was that, so far as petitioner knew, he enjoyed good health at the time of the application as in fact he did during the succeeding years while he worked for respondent.

A second possibility was a question, allegedly asked by respondent's examining physician (R. 1679). The question, with the physician's handwritten answer, appeared as follows:

> "Have you ever had a long or serious illness?
>
> *No* "

In this connection, there was evidence that while in the military service in the middle 1940's, petitioner had been hospitalized for 21 days on account of trouble with his side and that he had also told the Army doctors that at times he had had some trouble with his back (Tr. 612). But even assuming this was an illness, fair minded people might feel that this was neither "long" nor "serious".

The third possibility was also a question allegedly asked by the physician, the answer appearing in his handwriting (R. 1679):

> "Have you ever had Tumor, Ulcer, Physical Defect or been operated upon?
>
> *No* "

Petitioner denied that he was asked this question, but even if he was, there was no evidence to establish that he knew he had a physical defect (Tr. 622).

Petitioner's past employment record supports the view that he was in good health and knew of no physical

defect. His first job, before he was 19 years old was in the West Virginia Coal Mines (Tr. 601). To get this job, he took and passed a pre-employment physical examination (Tr. 602). His next job was making bomb shells (Tr. 601). Just after he turned 19 years of age, he was drafted and he entered the Army on July 18, 1945 (Tr. 600). He did not have any trouble passing the Army induction physical examination and he did not experience any difficulty performing his duties as a soldier during basic training (Tr. 604, 608). After he got out of the Army he went to a vocational school for about twenty months to learn to be an automobile mechanic and during this period, he also worked as a janitor (Tr. 625). He then returned to working in the mines, dusting the cut, loading coal, laying track and handling timbers weighing 40 to 50 pounds (Tr. 489, 490, 492). He also took and passed several pre-employment physical examinations in order to obtain these various jobs and he never experienced any trouble doing the necessary heavy physical labor which these jobs required (Tr. 492, 601-602, 630-632).

During the years he worked for respondent, petitioner was reputed to be and was one of the railroad's strongest brakemen (Tr. 315-316, 576-577). He always performed his duties in a satisfactory manner and was always considered a good and competent brakeman (Tr. 222, 276, 315-316, 346, 481, 529, 576-577, 1165, 1190). There had never been any complaints about the way in which he discharged his duties to or by any officials of the railroad (Tr. 596, 1190). His physical condition during this period was considered good by his fellow employees and also by his superiors (Tr. 315, 1165, 1190).

Respondent sought to establish, through petitioner's military service records, that petitioner had knowledge of his pre-existing spondylolisthesis and that he wilfully misrepresented this condition on his employment application. These records, however, when considered together, corroborate petitioner's belief that he was in good health and also that he had no knowledge of having spondylolisthesis at the time he applied for employment in 1951.[3]

Notwithstanding the judgment of the trial court, which deprived petitioner of his status of an employee entitled to the benefits of the FELA, respondent, both before and after the ruling, accorded petitioner the status of an employee. For example, petitioner's 1951 employment application, prepared of course by respondent, did not provide that misrepresentation would void his status as an employee but rather stated that a false statement or misrepresentation would justify dismissal[4] (R. 1678). Following the trial court's ruling, respondent continued to treat petitioner as an employee

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[3] While the records, as noted, indicate that petitioner was hospitalized for his side and back and that he also suffered congenitally from spondylolisthesis for aggravation of which, following his discharge, he was awarded a monthly pension of $11.50 (R. 1690), the records also established that this pension was revoked in July, 1948, and petitioner was notified that his condition was "not a disability under the law" (R. 1691). Respondent also relies on the fact that in December, 1950, petitioner, complaining of back trouble, executed an application for admission to a Veterans Administration Hospital (R. 1688); however, his application was denied and he was advised that medical findings failed to disclose a need for hospital treatment or domiciliary care (R. 1689).

[4] The exact language in the application was: "I fully and definitely understand that any false statement or misrepresentation herein will justify my dismissal from the service without an investigation hearing, regardless of when such fact may be discovered by the Company."

and, on November 24 ,1959, conducted a hearing to investigate if in fact there had been any misrepresentations by petitioner at the time he sought employment. Subsequently, by letter dated December 7, 1959, respondent advised him "You have been dismissed from the service for falsifying application for employment as Yard Brakeman and false statements made in connection with physical examination for employment, July 23, 1951" (R. 144F-H).

REASONS FOR GRANTING THE WRIT

The decisions below encroach upon the rights of employees under the Federal Employers Liability Act. They are in conflict with applicable decisions of this Court construing that statute.

1. The trial court concluded that a railroad defendant in an FELA case, which had enjoyed the benefits of an employee's services for more than five years without questioning his status—indeed had confirmed it on one occasion—could defeat his just claim for recompense for injuries suffered as a result of the railroad's negligence by showing that he had made misrepresentations when he applied for employment and that therefore he was not an employee within the meaning of the Act.

It purported to find support for this extraordinary result in this Court's decisions in *Minneapolis, St. P. & S. S. M. R. Co.* v. *Rock*, 279 U.S. 410, and *Minneapolis, St. P. & S. S. M. R. Co* v. *Borum*, 286 U.S. 447. Those cases, of course, do not stand for any such proposition.

In *Rock*, the putative employee who brought an action under the FELA was an impostor and was prop-

erly held to be no employee at all. In his own name and person he had been denied employment because of what an examination revealed as to his physical condition. Thereafter he applied under another name, representing that h had not theretofore applied for work, and had another person stand in for him at the required physical examination. In effect, therefore, the railroad hired a different man from the man it thought it was hiring, and the plaintiff could not fairly be considered an employee.

In *Borum*, the same railroad attempted to extend the principle of the *Rock* case to a very different fact situation—one strikingly similar to that involved here. This Court squarely rejected the attempt and made clear how limited is any rule to be derived from the *Rock* case.

In *Borum*, the undisputed fact was that the plaintiff employee, who, like petitioner, had served his railroad employer for many years, had falsified his age when he applied for employment. The railroad had a rule against employing anyone over the age of 45. The plaintiff was 49 but stated in his application and again to an examining physician that he was 38. These facts were held by the Court not to bring the case within the rule laid down in *Rock*.

In the course of its opinion in the *Borum* case, the Court remarked that "neither his age nor his physical condition contributed to cause [the plaintiff's] injury." The trial court may have misconstrued this language, which referred to the happening of the accident, not its effects. The trial court may have treated it as giving rise to a negative implication justifying it in denying employee status to petitioner because the effect of the accident caused by respondent's negli-

gence—to the happening of which accident the physical condition of petitioner, one of respondent's strongest brakemen, did not contribute in the slightest—was to aggravate a pre-existing condition that petitioner allegedly failed to disclose. Clearly, if any inference at all is to be drawn from the quoted statement, it is no more than that an employee who conceals myopia, for example, may not be heard to complain if he is injured in an accident which occurs as a result of his failing to see a railroad car. It does not mean that more than five years of faithful service will go for naught merely because employer negligence results in injury to a part of the body whose quite common, non-symptomatic and non-disabling condition an employee may not have disclosed. The decisions of federal and state courts are in accord with this view. *Payne* v. *Dougherty*, 283 Fed. 353 (8th Cir. 1922); *Matthews* v. *Atchinson, T. & S. F. Ry. Co.*, 54 Cal. App. 2d 549, 129 P. 2d 435 at 441 (1942); *White* v. *Thompson*, 181 Kan. 485, 312 P. 2d 612 at 613 & 620 (1957); and *Blanton* v. *Northern Pac. Ry. Co.*, 215 Minn. 442, 10 N.W. 2d 382 at 385 (1943); *Laughter* v. *Powell*, 219 N.C. 689, 14 S.E. 2d 826, 136 A.L.R. 1116 (1941) cert. den. 314 U.S. 666; See *Eresafe* v. *New York, New Haven & Hartford R. Co.*, 250 F. 2d 619 (2nd Cir. 1957); and *Casso* v. *Pennsylvania Railway Company*, 219 F. 2d 303 (3rd Cir. 1955); See generally Merrill, *Misrepresentations to Secure Employment*, 14 Minn. L. Rev. 646 (1930) and *Annot.*, 136 A.L.R. 1124 (1942).

2. We have assumed in the foregoing discussion that (as in *Rock* and *Borum*) there was unquestioned factual basis on which the trial court might act to sustain respondent's special plea. There was no such basis. As our statement of the case makes clear, the evidence was in sharp conflict as to (1) whether petitioner made

any misrepresentations, (2) whether any such misrepresentation was fraudulent or even knowing, (3) whether respondent, which made a careful examination of petitioner's physical condition, relied on any such misrepresentation in deciding to hire him and (4) whether respondent waived its right to rely on any such misrepresentation by subsequently rehiring petitioner without re-examining him.

In directing a verdict for respondent, the trial court resolved these factual issues in favor of respondent and adversely to petitioner. It hereby deprived petitioner of his right to trial by jury, which is "a basic and fundamental feature of our system of federal jurisprudence" and "is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act." *Bailey* v. *Central Vt. R. Co.*, 319 U.S. 350, 354.

The rule that, under the FELA, factual issues are for juries and not for judges, repeatedly emphasized by this Court in recent terms,[5] is, of course, not limited to issues involving negligence or causation. This was made clear in *Baker* v. *Texas and Pacific Railway Co.*, 359 U.S. 227, holding that whether or not an employee of an independent contractor of a railroad was also an employee of the railroad entitled to the benefits of the FELA was a question for the jury. See *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, which held that issues relating to alleged fraud in procuring a release were also for the jury and its verdict on such issues allowed to stand.

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[5] e.g. *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500; see generally DePareq, *A Decade Of Progress Under The Federal Employers' Liability Act*, 18 Law and Contemporary Problems, 257 at 260 (1953); and note, 69 Harv. L. Rev. 1441 at 1447 (1956).

CONCLUSION

For these reasons, it is submitted that petitioner was an employee within the meaning of and entitled to the benefits of the FELA and in any event that the issues were for the jury. It follows therefore that the trial court erred in directing a verdict for respondent.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LEWIS JACOBS
SIDNEY S. SACHS
LEONARD C. GREENEBAUM
NEWTON FROHLICH
737 Woodward Building
Washington 5, D. C.

WALTER G. BURTON
WALTER W. BURTON
BILLY E. BURKETT
Law Building
Princeton, West Virginia

Attorneys for Petitioner

SACHS AND JACOBS
BURTON, BURTON & BURKETT
of Counsel

February, 1961